No. 10,597.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED J. ROGERS, MIRON RUSTIGIAN and HAGOOHI RUSTIGIAN,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a corporation),

Appellee.

APPELLEE'S BRIEF.

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ARGUMENT, POINTS AND AUTHORITIES.

(Emphasis our own throughout unless otherwise indicated.)

I.

Bank of America National Trust and Savings Association Was an Aggrieved Party and Entitled to Review the Order of the Conciliation Commissioner Awarding Attorneys' Fees, and in Any Event Was Recognized as a Party Upon the Hearing Before the Conciliation Commissioner, and Was Therefore Entitled to Review Said Order.

The Bank, through its assignee E. B. Campbell, claims all right, title and interest in and to the Madera County prop-

erty, upon which the debtors predicate their status as farmers, and the rents, issues and profits thereof since May 24, 1940. [Tr. pp. 26-27.] This gave the Bank a status and position in the proceedings even more fundamental than that of a lien holding creditor, since, until the determination of the quiet title action, delegated to the State court for trial, had been made, no part of said real property nor of the rents, issues and profits thereof would constitute an asset of the bankruptcy estate.

It is conceded that the only source from which attorneys' fees could be paid is rents, issues and profits from said property, the *very assets in dispute.*

It is further conceded that the Bank offered no testimony upon the hearing before the Conciliation Commissioner, to support its alleged claim of title. Obviously it was not required to do so since that was not the issue before the Commissioner. That the Bank did claim title was well known to all parties, as was the fact that litigation was still pending to determine that issue. In fact the sole basis for the petition for allowance of counsel fees was the services rendered by the attorneys for the debtors in contesting the quiet title action brought on behalf of the Bank.

There appears to be an absence of authorities covering the identical factual situation here presented. The cases cited in appellants' brief are not in point, and are readily distinguishable.

In the case of *In re Snyder,* 4 Fed. (2d) 627, cited on page 13 of appellants' brief, the question involved was whether or not the appellant had the right to review an order authorizing suit against him. It did not involve any right, claim or interest in the bankruptcy estate. Ap-

pellant sought by his motion to vacate to obtain a determination in a summary proceeding of the precise issues to be decided in the plenary suit authorized to be brought against him. In the instant case the Bank had a direct and immediate pecuniary interest in the particular cause, namely, the disposition of assets to which it had made claim of title.

In *James v. Reconstruction Finance Corporation,* 122 Fed. (2d) 807, cited on page 14 of appellants' brief, the significant part of the opinion quoted by appellants is

> "* * * for even a party may not appeal from a judgment or order unless he has some interest in the subject matter thereof" (p. 808).

What greater interest could the Bank have in the subject matter than to claim complete title thereto?

In re Clark, 35 Fed. Supp. 722, cited on page 15 of appellants' brief, the creditor whose claim was disallowed could no longer participate in the assets of the bankruptcy estate, and therefore whatever disposition was made of them could cause him no injury, but that is not true of the Bank's position. Distribution of the very assets to which the Bank made claim of title would certainly be an injury and prejudice to the Bank.

The case of *In re Patterson McDonald Shipbuilding Company,* 288 Fed. 546, cited on page 15 of appellants' brief, is to the same effect as the *Clark* case, *supra,* and the same argument applies to it.

The remaining cases cited by appellants involve the right of a bankrupt to appeal. It requires no argument to point out that the position of a bankrupt is different from that of a creditor or adverse claimant. The bankrupt surren-

order allowed the claim of one Robert J. Graham. The petition to review the allowance of the claim was filed by another creditor who had opposed the allowance before the Referee. The District Court held that it lacked jurisdiction to entertain such a petition because the petition to review was not filed by the trustee, as the representative of all creditors. In reversing the District Court the Court stated:

> "These provisions (referring to Sections 2 and 38 of the Bankruptcy Act) make it clear that the Referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the Court of Bankruptcy, having no power except as conferred by the order of reference—reading this, of course, in the light of the act; and that his judicial functions, however important, are subject always to the review of the Bankruptcy Court. It is now universally conceded that a Bankruptcy Court is a court of equity, and the Referee but the officer or arm of such court. The right of review by the District Court extends to every final order of the Referee, and may be asserted by anyone having a direct substantial interest or by the court, *sua sponte*."

While we have devoted considerable space on this point, we cannot help but feel, in the light of the above decisions, that the true question is not the right of the Bank to review the Commissioner's order, but whether or not the Commissioner's order was proper and valid.

II.

In the Absence of Full Compliance With Order 44 of the General Orders of Bankruptcy, the Commissioner Was Without Authority to Award Attorneys' Fees.

The case of *Weil v. Neary,* 278 U. S. 160, is authority for the rule that General Orders in Bankruptcy and the rules of the District Court have the force and effect of law.

There are numerous authorities that hold that General Order 44 must be strictly observed.

In *In re H. L. Stratton, Inc.,* 51 Fed. (2d) 984, application was made by the Receiver in Bankruptcy for the appointment of attorneys for the Receiver. The petition failed to set forth the relation of the attorneys sought to be appointed with one of the creditors of the bankrupt, although it appeared that oral statements of that relationship were made to the judge. Upon the application for allowance of attorneys' fees in the sum of $15,000.00, it appeared that the attorneys rendered valuable services to the estate of the bankrupt. In reversing the decision of the District Judge who had confirmed the allowance of attorneys' fees on the ground that there had been substantial conformity to General Order 44, the court said at page 987:

> "Though the attorneys manifestly acted in good faith, their procedure was in disregard of rules made to safeguard insolvent estates, and was of the slipshod sort which often has characterized bankruptcy

practice. We cannot too emphatically insist that the rules are to be strictly observed and that oral statements made to a judge are no lawful substitute for the affidavits which are prescribed."

And at page 988 the court continued:

"Although everything indicates that the attorneys rendered valuable services to the estate of the bankrupt, we are constrained to hold that they are barred from receiving compensation as attorneys for the Receivers because of failure to comply with General Orders 44 and 42 and local rules 4 and 11. * * * This is a drastic order but the rules were made to be followed and require the result we have reached."

In *In re Eureka Upholstering Co.*, 48 Fed. (2d) 95, the Receiver who was later appointed trustee, never applied to the court for the appointment of attorney. It appeared, however, that while acting as Receiver, he consulted with the attorneys for the petitioning creditors and actually retained them as his attorneys. The referee and judge allowed $100.00 as attorneys' fees. The attorneys appealed. The court affirmed the allowance of $100.00 as compensation for acting for the petitioning creditors and in denying any allowance as attorneys for the Receiver, the court stated:

"Apparently the appellants suppose that by acting upon the retainer of the Receiver as his attorneys, they acquired that status and may recover on that basis. This is not true. The forty-fourth General Order in Bankruptcy (11 U. S. C. A., Sec. 53) provides that no attorney shall be appointed for the Receiver except by order of court and upon petition of the Receiver supported by the proposed attorney's affidavit. * * * The order and the rule were passed

> to control serious abuses and are to be strictly observed; without an order of court upon full presentation of the relation of the proposed attorney with all other interests involved, not only may he not be retained but he can recover nothing no matter how beneficial, or how arduous, his services."

Albers v. Dickinson, 127 Fed. (2d) 957, involved the attempt to surcharge the estate of the Trustee in Bankruptcy for attorney's fees paid without compliance with General Orders 42 and 44; the court held that the attorney's fees were improper and surcharged the account of the Trustee with the amounts paid to said attorney. In commenting on the rules, the opinion states at page 961:

> "These rules contemplate and require that, in order to permit the payment of any attorney's fees out of a bankrupt estate, as part of its administrative expenses, there must be a verified petition on the part of the Trustee, an order of appointment, a petition for allowance of compensation by such appointed attorney, together with the prescribed affidavit negativing the possibility of any improper fee division, as well as a notice to creditors. Without a full compliance with these requirements, the Trustee has no right to make any payment of attorney's fees out of the bankrupt estate; *the referee is without authority to approve any payments which the Trustee has then made;* and no attorney can legally receive or retain any such payments out of the estate for services which he may have rendered."

Appellants rely on Section 75(b) of the Bankruptcy Act as authortiy for the rule that the District Court may waive the Orders in Bankruptcy. A careful reading of the

language of said section clearly indicates that that was not the intention of Congress. Section 75(b) reads in part:

> "* * * the Supreme Court is authorized to make such general orders as it may find necessary properly to *govern the administration of the office of Conciliation Commissioner,* and proceedings under this section; but any District Court of the United States may, *for good cause shown,* and in the interests of Justice, permit any *such* general order to be waived."

It is obvious that the section refers only to the particular general orders passed in accordance with said section and applied specifically to the administration of the office of the Conciliation Commissioner and to proceedings under Section 75.

In accordance with Section 75(b) the Supreme Court as of April 24, 1933, established rule 50 as an addition to General Orders in Bankruptcy. This rule refers generally to administrative matters and in no way refers to the allowance of attorney's fees. At the time of the adoption of General Order 50, General Order 44 was already in effect and was applicable to all bankruptcy matters generally. Therefore, in enacting Section 75(b), Congress could not have intended to in any way affect, modify or disturb any of the general orders then in effect but must have intended the formulation of new rules or orders applying specifically to Section 75. The true effect of the words "permit any *such* general order to be waived," is apparent. It necessarily relates back to the general orders which the Supreme Court was authorized to make under this section. Therefore, the authority to waive can only be exercised with respect to General Order 50. The waiver

of any provision contained in General Order 50, or of all its provisions, would in no way affect the allowance of attorney's fees and could in no way abrogate the provisions of General Order 44. We respectfully submit that the only order controlling the appointment of attorneys is General Order 44, and that therefore the strict construction of its mandatory provisions by the courts in the decisions above cited and in numerous other decisions should prevail.

In any event, conceding for the purpose of argument only, that Section 75(b) grants the right to waive the General Orders in Bankruptcy, we then come to the consideration of how can such General Orders be waived. The record fails to disclose a definite and specific waiver for cause or otherwise. True, an attempt is made by appellants to establish a waiver by implication. We submit that the provisions of Section 75(b) do not permit the waiver of a rule of such grave importance as General Order 44 in such a loose and uncertain manner. The appellants base their contention that there was an implied waiver on the statements of the Conciliation Commissioner made at the hearing. [Tr. pp. 72-73.] The substance of the statements was that Mr. Rogers told the Commissioner what attorneys he was going to employ and that the Commissioner told him that he was justified in going ahead and getting them to help. There was nothing in those statements from which a waiver could be implied. It is more reasonable to presume that both Mr. Rogers and the Conciliation Commissioner were familiar with General Order 44 and that Mr. Rogers would in due course seek the proper appointment of himself and the other attorneys in conformity with said general order. Oral statements

made to a judge are no substitute for the petition prescribed.

In re H. L. Stratton, Inc., supra.

The language of Section 75(b) clearly contemplates a formal application to the court and a definite showing that good cause exists for the waiver of the general order. Otherwise, the words "for good cause *shown,*" would be meaningless. Those words necessarily imply the presentation of some proof of the existence of a cause sufficient to convince the court that the waiver of the particular general order would be a proper exercise of its discretion.

In *In re Progress Lektro Shave Corp.,* 117 Fed. (2d) 602, the debtor under Chapter 10 was represented by the appellant as its attorney. A trustee for the debtor was later appointed but no attorney for the trustee was appointed. The debtor's attorney performed services for the trustee. The appellant appealed from an order denying compensation. The Circuit Court, in affirming the order of the District Court, stated:

> "To recover compensation from the estate for services rendered to the trustee, an attorney must receive appointment under General Order 44. It is true that the appellant acted throughout with the consent and approval of the Referee, but this does not bring him within the proviso of Section 157, 11 U. S. C. A., Sec. 557. The waiver of disinterestedness there permitted must take the form of an appointment under General Order 44 and must be explicit; it cannot take the form of silent acquiescence."

This case does not recognize the right to waive General Order 44 but makes compliance with General Order 44 a condition precedent to the waiver permitted under Section 157, but then provides that the waiver must be explicit.

III.

Failure of the Conciliation Commissioner to Make Findings of Fact and Conclusions of Law in Support of His Order Makes It Invalid.

General Order 37 of the General Orders in Bankruptcy, 11 U. S. C. A., following Section 53, provides in part:

> "In proceedings under the Act, the rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these General Orders, be followed as nearly as may be. * * *"

Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), provides in part:

> "In all actions tried upon the facts without a jury, the court *shall* find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *. Requests for findings are not necessary for purposes of review."

We do not deem it necessary to cite any authorities in support of the proposition and that Rule 52(a) is not inconsistent with the Bankruptcy Act or with General Orders in Bankruptcy.

The foregoing rule has been construed to apply to all hearings before a court, where issues of fact are tried by the court without a jury.

This rule requiring the court to find facts specially and state separately its conclusions of law thereon in non-jury cases is mandatory.

> *U. S. Aluminum Company of America*, 2 F. R. D. 224.

This rule was directly applied in the case of *Perry v. Baumann* (9th Cir., 1941), 122 Fed. (2d) 409, which involved an order dismissing proceedings for agricultural composition upon motion of creditors of alleged farmer-debtor. In granting the motion to dismiss the proceedings, the court made no findings and stated no conclusions. The order of the lower court was reversed on the grounds that Rule 52(a) of the Rules of Civil Procedure apply and should have been followed in this case.

Conclusion.

We respectfully submit that for the reasons and upon the statements and authorities hereinabove set forth, the order appealed from should be affirmed.

Dated: Los Angeles, California, January 19, 1944.

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